United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7536

UNITED STATES COURT OF APPEALS
For the Second Circuit

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Plaintiff-Appellee,

against

OVERSEAS NATIONAL AIRWAYS

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the District Court, having held that a dispute under the Railway Labor Act is a "minor" dispute involving interpretation of an existing collective bargaining agreement, and having recognized that jurisdiction to make such interpretations and to resolve "minor" disputes is vested exclusively in the Adjustment Boards created by Congress, have jurisdiction to interpret the agreement, resolve the dispute, and issue a preliminary injunction directing the defendant to act in accordance with the Court's interpretation of the Agreement?

2. Did the District Court abuse its discretion in the present case by issuing a preliminary injunction where the plaintiff did not show that it would probably succeed in obtaining a permanent injunction or that there were serious questions involving the merits of the dispute and where the balance of hardships tips decidedly in favor of the defendant who would be irreparably injured by a preliminary injunction while the plaintiff could be compensated by a monetary award?

Preliminary Statement

This is an appeal from an order of Judge Mark A. Costantino of the United States District Court, Eastern District of New York, which enjoined appellant, Overseas National Airways, Inc. ("ONA"), a certified supplemental (charter) air carrier, from implementing its Pilot Bulletin No. 35-75 (38A) which provided that ONA's DC-8 and DC-10 reserve pilots would have to perform their reserve duty at a location within three hours driving distance of their equipment domicile (permanent base of assignment.) The injunction was stayed by the District Court until appellant could move for a stay in this Court (Order of September 23, 1975). Subsequently, a panel of this Court, by order dated September 30, 1975, extended the stay pending argument of the appeal. A continuation of the stay pending determination of the appeal will be requested at the argument.

Statement of the Case

This action, which purports to be based on the provisions of the Railway Labor Act, 45 U.S.C. § 151 et seq., was commenced by respondent, Air Line Pilots Association, International ("ALPA"), a labor organization which is the certified bargaining representative for ONA's pilots, on May 29, 1975 (Complaint, 5A). ALPA sought to enjoin ONA from

implementing Pilot Bulletin 35-75 which stated that:

> "Effective 1 June 1975 all line holders will be required to be within three (3) hours driving time of their equipment domicile during their days of reserve duty.
>
> "The bid lines will reflect the duty days on the reserve lines and these are the days that the reserve line holder will be available for schedule as stipulated above." (38A)

The complaint also seeks a declaratory judgment and damages (16A).

ALPA claims the Pilot Bulletin violated Section 31 L of the Collective Bargaining Agreement between the parties,* which states in pertinent part:

> "L. A pilot shall have a minimum of twenty-four (24) hours notification prior to reporting time for any duty. . ." (340A).

This is sometimes referred to as "the 24-hour rule".

As shown in ONA's proof in the Court below, ONA has always had, and has continuously exercised, the right, pursuant to Section 31 I of the Collective Bargaining Agreement,** to designate the location where pilots are to perform their reserve duty, and further, the 24 hour notice

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*ALPA concedes, as it must, that the Collective Bargaining Agreement at issue is the only agreement between the parties on the working conditions in dispute herein, and that it applies to all of ONA's pilots, whether their equipment is DC-8, DC-9 or DC-10, since the pilots are all members of the same craft and class (Testimony of Dries, 235A).

**Section 31 I provides that:

> "All pilots are subject to all Company policies now or hereinafter in effect except as they may be inconsistent with anything contained herein." (339A) (emphasis supplied)

required by Section 31 L was satisfied where pilots were awarded their monthly bid lines, which showed duty days for each commencing month, prior to the start of that month. Pilots were always notified of these awards more than 24 hours before the start of the month.

At first, Judge Costantino, after hearing oral argument and receiving evidence, denied ALPA's application for a preliminary injunction and vacated the temporary restraining order which had previously been granted (95A). After ALPA filed a Notice of Appeal to this Court, Judge Costantino vacated his order of June 5, and directed a further hearing to take place beginning on June 11 (Order of June 10, 1975). ALPA's appeal was subsequently dismissed voluntarily pursuant to Rule 42(a), Fed. R. App. P. (Stipulation and Order of Dismissal June 10, 1975).

A hearing on ALPA's motion for a preliminary injunction was held on June 11, 13 and 17, 1975 at which testimony was taken from seven witnesses, and twelve exhibits were introduced into evidence. Thereafter, in a Memorandum dated July 24, 1975, Judge Costantino reversed his prior ruling and granted ALPA's motion for a preliminary injunction. Pursuant to this Memorandum, an order was entered on August 1, 1975, directing ONA to withdraw Pilot Bulletin 35-75 (386A). By successive Orders of the District Court and of this Court, the preliminary injunction has been stayed pending the argument of this appeal.

Statement of Facts

ALPA alleges that ONA's Pilot Bulletin No. 35-75 constitutes an attempt by ONA to abrogate the 24-hour rule set out in Section 31 L of the Collective Bargaining Agreement by reducing the period of notification to three hours for DC-8 and DC-10 reserve pilots (Complaint ¶¶20-22, 10A-11A). The evidence adduced in the proceedings below show that this is not the case. At the very least the evidence shows, as the Court below expressly found, that:

> ". . . each side may honestly hold conflicting interpretations of Section 31.L. . . ." (Memorandum of July 24, 1975, (384A)

Because of the technical nature of the practices involved, a brief review of the pertinent working conditions would be useful.

ONA's pilots bid and are awarded reserve bid lines on a monthly basis. More than 24 hours before the beginning of each month, the reserve pilots receive notification of those days that they are to be on reserve duty during that month (Ferriss Aff. June 2, 1975, ¶ 7, at 49A). These pilots are expected to be available on those days when they are on duty to make flights on short notice in case of emergencies (Ibid, ¶ 8,at 49A).*

It has always been ONA's practice, pursuant to its right under Section 31 I of the Collective Bargaining Agreement,

*A reserve pilot is available for duty on the days designated in his monthly bidline whether or not he actually is called on to make a flight.

to designate the location where the reserve duty was to be performed - either at the pilot's home or, as the needs of ONA dictate, at his equipment domicile (i.e., permanent base of assignment) or at any other location where ONA expected to need a reserve pilot (Ibid ¶¶ 4, 15, at 48A, 51A; Waring Aff. June 13, 1975, ¶ 20, at 274A). ONA's right to designate the location of reserve availability has always been considered separate and distinct from the requirements of the 24 hour rule. Thus, Lester Ferriss, ONA's Assistant Vice President-Operations stated in an affidavit submitted to the District Court:

> "Section 31 L of the Collective Bargaining Agreement between ONA and ALPA covering ONA's pilots, which provides that 24 hours notice will be given to a pilot before he is required to report for duty, is entirely separate and apart from the policy relating to availability of pilots who are already on duty on any given day." (Ferriss Aff. June 2, 1975, ¶ 5, at 48A).

As for the 24-hour rule, it had always been considered satisfied when pilots were notified of their on-duty days for the coming month 24 hours before that month was to start (Ibid).

On October 4, 1973, ALPA attempted to change this long-held interpretation of the 24-hour rule, and tried to impose an additional notice requirement to that contained in Section 31 L, a position which they are reiterating in this lawsuit. In a letter from Thomas Ahern, Chairman of ALPA's Central Scheduling Committee, to Lester Ferriss, ONA's Assistant Vice President-Operations, ALPA proposed

that reserve pilots must, in addition to receiving 24 hours notice of which days they were on reserve, receive 24 hours notice for each individual trip (letter from Thomas Ahern to Lester Ferriss, October 4, 1973, Ferriss Aff. June 2, 1975, Exh. A at 54A).

ALPA's proferred new interpretation* of the 24-hour rule was promptly rejected by ONA which reiterated its adherence to the traditionally understood requirements of Sections 31 L and 31 I in the following terms:

> "Section 5 H 7 applies. A pilot bids for reserve duty, and the Company will indicate on the reserve line where the reserve duty will be performed: At the domicile or at any other designated place where the Company may have an expectation to need the pilot.** Twenty-four hours notice will be given before duty (Section 31 L), but once on duty twenty-four hours notice is not required before a trip or flight." (Letter from Malcolm Starkloff, ONA's Vice President-Operations, to E. C. Veronelli, Chairman ALPA Pilot's Unit at ONA, dated October 8, 1973, Ferriss Aff. June 2, 1975, Exh. B, at 57A).

ONA thereafter continued to schedule and assign its pilots in accordance with the historic practice expressed in Mr. Starkloff's letter. Specifically, as even ALPA's witnesses testified at the hearing in the District Court, reserve pilots, including themselves, regularly accepted,

*If ALPA's interpretation of the 24-hour rule is correct, and reserve pilots can turn down specific flights for which they have not received 24 hours advance notice, then the purpose of having a reserve system is entirely vitiated, since they will not be available to fly in case of emergencies (Ferriss Aff. June 2, 1975, ¶ 6, at 48A-49A)

**Unless otherwise stated, all emphasis has been supplied.

and continue to accept trips or flights on less than 24 hours notice (Testimony of Secola, 129A-131A; Testimony of Meldahl, 165A-166A). Neither ALPA or any of its members filed a grievance against this practice (Ferriss Aff. June 2, 1975, ¶¶ 9, 14, at 49A-50A, 51A; Waring Aff. July 13, 1975, ¶ 9, at 241A-242A; Testimony of Marshall, 117A).

In addition, Robert Waring, ONA's Director of Flight Control in Wilmington, Ohio, testified that the Wilmington Crew Schedules Logs and flow sheets (Waring Aff. July 13, 1975, Exh. A, at 248A) showed that reserve pilots based in Wilmington have been regularly assigned trips on duty days with less than 24 hours notice. Every one of the trips assigned on less than 24 hours notice was, in fact, flown by the assigned reserve pilot on less than 24 hours notice. No reserve pilot either refused to fly such a trip on less than 24 hours notice or filed a grievance charging violation of Section 31 L (Waring Aff. June 13, 1975 ¶¶ 9-19, at 241A-246A; Testimony of Waring, 221A-224A).

Occasionally, an individual pilot would question a short notice trip assignment on the basis of Section 31 L (Waring Aff. July 13, 1975, ¶¶10-17, at 243A-244A). While they all flew as directed, and none filed a grievance, ONA, in order to avoid any conceivable misunderstanding on the part of any pilot, proposed during contract negotiations

that the language of Section 31 L be changed to spell out the fact that it did not apply to trip or flight assignments of pilots already available for duty (Testimony of Ferriss, 175A-177A). Since ALPA opposed the language change, the parties were required, under the Railway Labor Act, to mediate the proposal. This mediation is presently in progress (Secola Aff , May 29, 1975, ¶¶ 10-12, at 26A-27A).

Pursuant to ONA's long established practice of designating the location where pilots are to perform their reserve duty, ONA, on May 14, 1975, promulgated Pilot Bulletin No. 75-35 (16A). The evidence in the record is clear that the Bulletin does not affect the pilots' rights under the 24-hour rule as ALPA claims. Reserve pilots will continue, under the long-standing practice of the parties, to receive 24 hours notice of those days of each month that they are to be on duty, in compliance with Section 31 L. The Bulletin merely operates to effectuate the requirements of the reserve system by ensuring that reserve pilots are physically available to fly on short notice on the days they were previously scheduled for reserve duty.

From the foregoing, it is clear that ALPA's position is not supported by the record. In any event, the record shows that ONA's position is not obviously

insubstantial. At best, this is a dispute involving the interpretation of the terms of an existing collective bargaining agreement in light of the customs and usage of the parties and of the industry. As we will show, such interpretation was not intended by Congress to be made by the Courts.

The Opinions Below and the Order Appealed From

In its first Memorandum and Order, dated June 5, 1975, the District Court denied ALPA's motion for a preliminary injunction and vacated a temporary restraining order which had previously been granted (95A). Judge Costantino correctly explained the reasons for his decision as follows:

> "It appears that the dispute between the parties as to the proper interpretation of the '24-hour' rule (Section 31 L. of the Collective Bargaining Agreement) is a 'minor dispute.' Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945). 'A [minor] dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation . . . .' Elgin, at 723. To resolve this dispute, the court would have to engage in interpretation of the collective bargaining agreement, something it may not do. Order of Railway Conductors v. Pitney, 326 U.S. 562 (1946). The court is left in the difficult position of determining what the status quo is while being forbidden to interpret the contract. Under these circumstances the extraordinary relief of a preliminary injunction is inappropriate. Accordingly, the motion for a preliminary injunction is denied and the temporary restraining order previously entered is vacated" (97A-98A).

After ALPA filed a notice of appeal, Judge Costantino vacated this Order and directed that a hearing be held (Order of June 10, 1975). Subsequent to the hearing, in a Memorandum dated July 24, 1975, Judge Costantino granted ALPA's application for a preliminary injunction, thus reversing his prior ruling (375A). The Court recognized, as it had previously, that "[t]he proper interpretation of Section 31.L. is a matter for an arbitrator, not this court, Order of Railway Conductors v. Pitney, 321 [sic] U.S. 562 (1946)" (379A). Judge Costantino also specifically found as fact that ONA's position regarding the proper interpretation to be given to Section 31 L. of the Collective Bargaining Agreement was not insubstantial or frivolous. Thus, the Memorandum states the Court could not "say with certainty that ALPA's interpretation of Section 31.L. is correct and ONA's is totally incorrect" (382A), and that "each side may honestly hold conflicting interpretations of Section 31.L." (384A).

Despite the fact that all of the relevant authorities including the Court below (see Point I, infra), have held that a Court cannot interpret a collective bargaining agreement and issue an injunction under the Railway Labor Act where the position of the party sought to be enjoined is not frivolous, Judge Constantino went on to issue a preliminary injunction on the grounds that "ALPA's interpretation

is more consistent with the other contract language" (384A), and that there was evidence which the Court said showed "ONA regarded the matter as open and ambiguous and in need of negotiation" (382A), a view the Court apparently adopted.

In accordance with this Memorandum Opinion, the District Court entered an order dated August 1, 1975, directing ONA to withdraw its Pilot Bulletin No. 35-75 (386A). The effect of this order was stayed until September 30, 1975 (Ibid and Order of September 23, 1975) at which time the stay was continued by this Court pending argument of this appeal.*

It is clear from the foregoing that the central issue in this lawsuit is the interpretation of a disputed provision of a collective bargaining agreement. Congress has stated, in the Railway Labor Act, that such disputes are to be resolved by an Adjustment Board, and not by the Courts. The only time a Court has jurisdiction to issue an injunction is in the case of a "major" dispute, which has been defined by all of the relevant authorities as a dispute where the position of the party sought to be enjoined is insubstantial or frivolous.

*The Clerk of the District Court did not notify the parties of the entry of the August 1 Order. As a result, ONA's Notice of Appeal was not filed under September 12, 1975. On September 23, 1975, the District Court, pursuant to Rule 4(a) Fed. R. App. P., extended ONA's time to file its Notice of Appeal up to and including September 12 (Order of September 12, 1975).

The District Court in the present case specifically found that ONA's position was honestly held and therefore was not frivolous. This holding is clearly supported by the evidence. Under these circumstances Judge Costantino was without jurisdiction to interpret the agreement in ALPA's favor and to issue a preliminary injunction.

ARGUMENT

POINT I

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT

A. The Dispute in the Present Case is a Minor Dispute

The term "minor dispute" as applied to labor disputes under the Railway Labor Act was exemplified by the Third Circuit in the recent case of United Transportation Union v. Penn Central Transportation Co., 505 F.2d 542, 545 (3d Cir. 1974), as follows:

> "The district court found, and we agree, that the Company's contention that the collective bargaining agreement sanctions the disputed changes is not 'obviously insubstantial' and the dispute is a 'minor' one within the meaning of the Act. The status quo provision of section 6 does not apply to 'minor' disputes and a party may effect a change pending resolution of the dispute by the Adjustment Board."

From this holding it is clear that the District Court lacked jurisdiction to issue an injunction in the present case unless ONA's interpretation of Section 31 L was "obviously insubstantial," i.e., unless the dispute in the present case is a "major dispute."

In the present case, however, the District Court held on two separate occasions that the dispute between ALPA and ONA was a minor dispute. In its Memorandum and Order of June 5, 1975, denying ALPA's application for a preliminary injunction, Judge Costantino correctly stated that:

> "It appears that the dispute between the parties as to the proper interpretation of the '24-hour' rule (Section 31 L. of the Collective Bargaining Agreement) is a 'minor dispute.' Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945). 'A [minor] dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. . . .' Elgin, at 723. To resolve this dispute, the court would have to engage in interpretation of the collective bargaining agreement, something it may not do. Order of Railway Conductors v. Pitney, 326 U.S. 562 (1946). The court is left in the difficult position of determining what the status quo is while being forbidden to interpret the contract. Under these circumstances the extraordinary relief of a preliminary injunction is inappropriate." (97A)

In his Memorandum of July 24, 1975, issued after an evidentiary hearing, Judge Costantino specifically found as fact that "each side may honestly hold conflicting interpretations of Section 31.L" (384A) and that he could not "say with certainty that ALPA's interpretation of Section 31.L. is correct and ONA's is totally incorrect" (382A).* The District Court thus clearly held that ONA's position regarding the interpretation of its right to designate the location where reserve duty is to be served and of the 24-hour rule was not obviously insubstantial or frivolous. Accordingly, the dispute in the present case is clearly a minor dispute involving the interpretation of an existing collective bargaining agreement. Under all of the authorities which have

*Under Rule 52(a) of the Federal Rules of Civil Procedure, these fact findings are not to be set aside unless they are "clearly erroneous."

"Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it is also intended to leave a minimum responsibility to the courts.

* * * *

". . . O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then."

The holding of Pitney has been reaffirmed and remains the required rule in this case. In Transportation Union v. U. P. R. Co., 385 U.S. 157, 164 (1966), the court, relying on Pitney, held that the arbitrators provided by the statutes have stated that "exclusive jurisdiction to hear and determine [minor] disputes. . . ."

In keeping with this policy, the Courts have uniformly recognized their limited role in this area, and have held that injunctive relief is appropriate only in the case of a major dispute and is not appropriate in the case of a minor dispute.

Thus, in Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 307 F.2d 21, 36 (2d Cir. 1962), cert. denied, 372 U.S. 954 (1963), this Court stated the applicable rule as follows:

"In the light of the provisions of the collective bargaining agreements, the prior conduct of the parties as found by the trial judge and the decisions in analogous cases, we hold that the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960; therefore, we hold that the ensuing dispute must be viewed by the courts as a minor dispute. Whether the railroad does in fact have the rights it claims, or whether on further analysis it does not is for the Board to determine; on the ultimate resolution of this issue we express no opinion. We only hold that for the purpose of defining the extent to which a court may intervene and enjoin a strike the dispute in the present case is to be considered minor as one involving the interpretation of existing agreements" (emphasis partially supplied).

The standard for granting injunctive relief set forth in the Penn Central and Rutland Railway cases has been followed by every other Court of Appeals that has considered the issue. Their decisions are so clear that explanation in details is not necessary. The pertinent holdings will be quoted with a minimum of commentary.

The Seventh Circuit stated in United Transportation Union v. Baker, 499 F.2d 727, 730 (7th Cir.), cert. denied, 419 U.S. 839 (1974), that a District Court cannot enjoin a party from implementing its interpretation of a Collective Bargaining Agreement unless it could find that that party's interpretation of the agreement was:

"so frivolous and so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures by Section 6 for alteration of existing agreements."

The Court of Appeals for the District of Columbia Circuit, in Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen, 384 F.2d 323, 327 (D.C. Cir. 1967), put the rule as follows:

> "But we think that, where the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a 'major' dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements."

In the Ninth Circuit, the Court of Appeals, in Switchmen's Union of North America v. Southern Pacific Co., 398 F.2d 443, 447 (9th Cir. 1968) held:

> "[W]here the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, as illuminated by long-standing practices, the question of whether the position is well taken involves a minor dispute."

In the First Circuit, in Airlines Stewards & S. Ass'n., Loc. 550 v. Caribbean Atl. A., Inc., 412 F.2d 289, 291 (1st Cir. 1969), the Court of Appeals reversed an injunction issued by the District Court because no finding "could be made" that the carriers' "contractual defense was so obviously insubstantial as to be an attempt to circumvent § 6 of the Railway Labor Act" and enunciated the standard in the following terms:

> "But in deciding whether to assume jurisdiction to grant injunctive relief, the court's task is not to interpret the contract. It is to determine whether the contractual defense is frivolous. Otherwise the arbitration machinery mandated by the Railway Labor Act will be dealt a crippling blow."

The Sixth Circuit, applying the same generally accepted test, reversed an injunction granted by the District Court in a Railway Labor Act case where, as here, one party claimed the carrier's action was an attempt to implement a new condition of employment not covered by the Agreement; and the other party claimed that its action was sanctioned by the Agreement. The case is Local 1477, United Transportation Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973):

> "Confronted by such opposing characterization of particular disputes, the courts of appeals have consistently ruled that if the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is within the exclusive province of the National Railroad Adjustment Board."

The Eighth Circuit, in United Transportation Union v. Burlington Northern, Inc., 458 F.2d 354, 357 (8th Cir. 1972), vacated another improvident injunction issued by the District Court, and remanded the case because it was at least "arguable" that the company's actions were sanctioned by the existing collective bargaining agreement. Moreover, the Court held that the party seeking an injunction must show that irreparable injury would occur if the injunction were not granted.

> ". . . the test to be applied is that if the contract is reasonably susceptible to the interpretations sought by both the carrier and union, the dispute is minor and within exclusive adjustment jurisdiction, Order of Ry. Conductors v. Pitney, supra; . . . and the injunction can issue only upon an equitable showing of irreparable injury."

Finally, the Fifth Circuit has adopted the Rule applied by this Court. See, REA Express, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, 459 F.2d 226, 231 (5th Cir.), cert. denied, 409 U.S. 892 (1972):

> "The key word in this test is 'arguable.' If the court finds an arguable basis it must defer to the expertise of the Adjustment Board."

C. The Issuance of a Preliminary Injunction in the Present Case Was Error

The fact that Judge Costantino, despite his holding that the dispute between ALPA and ONA was a minor dispute, actually interpreted the Collective Bargaining Agreement in ALPA's favor and issued an injunction, is, in view of the uniform authority mandating the opposite result, inexplicable. Certainly, his finding that ONA's position was not frivolous is supported by the evidence. As was shown in the Statement of Facts, the evidence clearly reveals that

1) ONA has always exercised the right to designate the location where on duty reserve pilots were to perform their reserve duty;

2) It had always been understood that the 24-hour rule was satisfied with respect to reserve pilots when they were given 24 hours notice of the days of a particular month that they were to be on reserve duty;

3) In 1973 ALPA attempted to unilaterally impose the further requirement that reserve pilots be given an additional 24 hours notice prior to each trip or flight, and this attempt was promptly rejected by ONA without a grievance by ALPA or any of its members;

4) Under ALPA's interpretation of Section 31 L, the reserve system at ONA would be effectively destroyed; and

5) ALPA's interpretation has never been applied even by reserve pilots, who have accepted and continue to accept flights on less than 24 hours notice without having filed grievances.

Thus, the evidence makes clear at least that the District Court was entirely correct in finding that ONA's position regarding Section 31 L is honestly held, and is not obviously insubstantial or frivolous. Having correctly made this finding, Judge Costantino could go no further and could not resolve the merits of the dispute. He was required to dismiss the lawsuit and allow the Adjustment Board to arbitrate the disagreement upon filing of a grievance.

POINT II

EVEN IF THE COURT BELOW HAD JURISDICTION THE ISSUANCE OF A PRELIMINARY INJUNCTION IN THIS CASE WAS AN ABUSE OF DISCRETION

Even assuming that the District Court had jurisdiction over the subject matter of this dispute, the issuance of a preliminary injunction was clear error and an abuse

of discretion requiring reversal. In order to obtain preliminary injunctive relief, the party seeking such relief must show either (1) probability of success on the merits and immediate irreparable injury or (2) serious questions involving the merits requiring further investigation and litigation and that the balance of hardship tips strongly in favor of the party seeking relief. E.g., Columbia Pictures Indus., Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894 (2d Cir. 1974); Gulf & Western Indus., Inc. v. Great Atl. & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973).

In the Statement of Facts and Point I, supra, we have shown that ALPA has not raised serious questions as to whether it will succeed on the merits of an application for a permanent injunction, nor has ALPA shown that it will probably succeed on an application for a permanent injunction. In addition the record clearly shows that the balance of hardship in this case is in favor of ONA.

A. ONA Will Suffer Irreparable Injury as a Result of an Injunction

The evidence in the record demonstrates that the chief function of the reserve system is to ensure that pilots are available to make flights in the event of emergencies which, of course, can occur less than 24 hours prior to a scheduled flight (Ferriss Aff. June 2, 1975, ¶¶ 6, 8, at 48A, 49A). Thus, at the hearing, Mr. Ferriss testified that:

"The function of reserve crews is to provide a capability for additional trips, we may have acquired additional flights which may have been acquired from agents and customers by the Company, either well in advance of an operating date or just prior to an operating date.

"It is further to fulfill requirements which may be created by the many vagaries in which the airline industry is involved, including sickness of a pilot which occurs just prior to a scheduled departure; weather; diversions of aircraft which may require the crew operating to leave the aircraft because their duty time has expired; or maintenance delays at en route or terminal stops which result in the same thing.

"They are to provide a capability to the Company so that flights may either operate or continue, even though there have been changes, unanticipated changes to schedules." (207A-208A)

The effect on the reserve system at ONA of ALPA's interpretation of the 24-hour rule was starkly illustrated by the testimony at the hearing of ALPA's witness Captain Marshall:

"Q [BY MR. MANGONE]: Captain Marshall, I would like to discuss for a minute this question of what happens when there is an illness by a pilot. It is now two minutes to twelve in the morning and ONA has a flight scheduled to depart at 8:00 p.m. this evening to Frankfort. It is a DC-8. You are scheduled to fly that flight. You call in sick.

"Now, what you are saying is that in order to get another pilot to fly your trip for you, ONA would have to give that pilot 24 hours' notice even though [he] held a reserve line and today was a day designated as a day he was available for duty?

"A That's true.

"Q So then if the reserve pilot would say, 'I don't want to fly this trip because I do not have 24 hours' notice,' and a schedule pilot like yourself had a personal commitment and said, 'I don't want to fly the trip,' ONA could not get a pilot to fly that trip under your interpretation of the contract"

"A That is true.

"Q It couldn't fly the people?

"A Yes.

"Q You say that is the way Rule 31 L has been applied?

"A That is true. I didn't address myself --

"Q I asked the question and you answered it and I think that is correct. Your answer is correct; is that right?

"A Correct." (114A-115A)

The proof in the Court below shows that in fact, that is not the way Section 31 L has been applied, and moreover, that, if it were, ONA would never be able to have pilots available in the event of short notice emergencies, and the reserve system at ONA would be substantially destroyed. The resulting injury to ONA due to loss of revenue and customer good will resulting from delayed or cancelled flights would obviously be enormous.

On the other hand, any pilots who would have to comply with 35-75 by being available at their equipment domicile or other locations would be damaged, if at all, by the value of their time, an injury which is easily compensated by monetary damages.

Thus, it is clear that the balance of equities in this case tips sharply in favor of ONA, which would suffer irreparable injury as a result of an injunction. The issuance of a preliminary injunction in the present case was therefore a clear abuse of discretion requiring reversal. See Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846 (3d Cir. 1973).

CONCLUSION

For the reasons stated above, the decision of the District Court should be reversed, the preliminary injunction should be vacated, and the complaint herein should be dismissed for lack of jurisdiction.

Dated: New York, N. Y.
October 10, 1975

Respectfully submitted,

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